Nueva Engineering, Inc. *and* Petroleum, Construction, Tankline Drivers & Allied Employees, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 5-CA-14620

16 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 7 July 1983 Administrative Law Judge Sidney J. Barban issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Nueva Engineering Inc., Baltimore, Maryland, its officers, agents, successors, and assigns shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The administrative law judge inadvertently failed to conform the notice to the recommended Order. Accordingly, we shall modify the notice.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in or activities on behalf of Petroleum Construction, Tankline Drivers & Allied Employees, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by laying off or otherwise discriminating against employees in regard to their conditions of employment.

WE WILL NOT coercively interrogate employees concerning their activities on behalf of or in support of a labor union.

WE WILL NOT threaten employees with loss of employment or other reprisal if they join or support a labor union. WE WILL NOT engage in surveillance of employees because they are engaged in or are suspected of engaging in activities on behalf of a labor union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Cecilia Leach whole for any loss of earnings and benefits she may have suffered by reason of her layoff from 16 August to 11 October 1982, with interest.

WE WILL notify here that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

NUEVA ENGINEERING, INC.

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge. This matter was heard at Baltimore, Maryland, on January 6 and 10, 1983, upon a complaint issued on October 1, 1982, as amended at the hearing, based upon a charge filed[1] by Charging Party Petroleum, Construction Tankline Drivers & Allied Employees, IBTCWHA (herein the Union), on August 17. The complaint alleges that Respondent Nueva Engineering, Inc. violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), by threatening employees with loss of employment if they selected the Union as their bargaining representative, by interrogating employees concerning union activities and inclinations, and by engaging in surveillance of union activities, and violated Section 8(a)(1) and (3) of the of the Act by the layoff of Cecilia Leach. Respondent's answer denies the unfair labor practices alleged, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under the Board's current standards (Respondent, while engaged at Baltimore, Maryland, in the production of electronic circuit boards during a recent annual period, sold and

[1] All dates herein are in 1982 unless otherwise noted.

shipped from its Baltimore facility goods and materials valued in excess of $50,000 directly to points outside the State of Maryland) and to support a finding that the Union is a labor organization within the meaning of the Act.

On the entire record in this case,[2] from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by Respondent and the General Counsel, I make the following

FINDINGS AND CONCLUSIONS

I. THE FACTS

A. *Introduction*

At times material to this proceeding, about the middle of August 1982, Respondent employed about 88 employees on 2 shifts in various departments, with production foremen in charge of one or more departments.[3] In at least two of the departments, shipping and inspection, there were intermediate leadpersons to whom the employees reported, and who themselves reported to the production foremen. The production foremen reported to Thomas J. Pozzuoli, Respondent's vice president and the general manager.

The complaint, as amended at the hearing, alleges that a leadperson in the inspection department, Regina Brown (herein R. Brown), is a supervisor and agent of Respondent within the meaning of the Act. Respondent denies this. This dispute will be considered immediately below.

B. *The Supervisory Status of R. Brown*

The record shows that R. Brown assigned work to employees in the inspection department and instructed the employees as to what they should do, as well as assisted them in their problems at work. When Respondent decided to let certain employees go (by layoff or termination) on August 16, as discussed hereinafter, it was R. Brown who selected the employees to be let go from her department. These selections were approved by Pozzuoli.[4]

On the basis of the above, and the entire record, I find that R. Brown is a supervisor and an agent of Respondent within the meaning of the Act.

C. *Employee's Union Activities; Respondent's Alleged Reaction*

1. The week of August 9

Though there is some uncertainty as to the dates of certain occurrences, it is clear that during the week prior to Respondent's layoff of employees on August 16 the Union began distributing leaflets at Respondent's plant designed to encourage employees to join and support the Union; some of these leaflets were posted in the plant. During that week there were discussions about the Union among the employees in which Cecilia Leach was a particular proponent of the Union. A small number of employees, including Leach, met with two union representatives during that week at a nearby restaurant during their lunch period (Leach was the only employee from her department—the shipping room—to attend); and a number of employees, including Leach, signed union cards.[5]

According to Leach, beginning sometime about the first part of the week of August 9, Foreman Brown, when passing her, would display a piece of union literature and make comments such as "pricken union," and "union is not getting in here." She stated that this continued until she was laid off on August 16. On either Thursday, August 12, or Friday, August 13, Foreman Brown spoke to Leach, she said, in the foyer leading out of the plant, stating to her that "if you don't like working for this company and you are for all that Union business, then why don't you work somewhere else because I don't want no f—g union in here." Employee Cheryl Langrehr, who was standing close by, substantially corroborated Leach, though she attributed even stronger language to Brown to the same effect. Leach stated that she did not answer Brown, but walked to her locker and eventually left the plant.

Foreman Brown denied that he used the words "f—g union" to Leach on that Thursday or Friday. He was not asked about the rest of the conversation and did not testify about it. Three employees and the shipping room leadperson, who were shipping room about that time, testified that they did not hear Brown use those two words to Leach. They did not testify concerning the substance of the conversation alleged by Leach.

Respondent argues (Br., pp. 2–5) that Leach's testimony should be considered suspect inasmuch as she was inconsistent as to the dates of occurrences during the week of August 9, because she testified at one point that she was senior by 4 months to others in the shipping department whereas she was senior to one such employee by about 3 months only, and because her testimony was not corroborated by Respondent's witnesses. Respondent further asserts that her testimony should be viewed with

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[2] The General Counsel's motion to correct the transcript, attached to her brief, to which no objection has been received, is hereby granted.

[3] The complaint alleges and the answer admits that one of these foremen, Howard Lee Brown (herein Foreman Brown or Brown), is a supervisor and agent of Respondent within the meaning of the Act.

[4] There is indication in Pozzuoli's testimony that he had expected the production foreman in that department to make that selection. However, Foreman Brown testified that Pozzuoli told him that Pozzuoli had asked R. Brown to select the employees to be let go in her department. An employee who was terminated on August 16 from the inspection department, Cheryl Langrehr, testified that Pozzuoli told her that R. Brown had made the decision to discharge her. This testimony was undenied. I am satisfied that Pozzuoli either told R. Brown to select the employees to be let go or, at a minimum, approved her exercise of that authority.

[5] I believe that the General Counsel's witness Langrehr was in error in stating that she saw union literature during the latter part of July. I likewise do not credit Production Foreman Brown that he heard about union activities 2 weeks before August 16, though he admittedly was aware before that date that Leach and some others were engaged in union activities. General Manager Pozzuoli agreed that he saw union literature posted at Respondent's premises during the entire week before the August 16 layoff.

caution because "she stands to benefit directly from a decision adverse to Respondent." It is further asserted that Langrehr should be disbelieved because she differs with Leach as to the date the meeting with the union agents took place and as to the date on which she overheard the conversation between Brown and Leach at issue here. Respondent also notes that Langrehr referred to this incident only in the second affidavit which she gave to the Board investigator, and even then the affidavit refers to "Rob" when it should have referred to "Lee" as speaking to Leach. Additionally, it is asserted that Langrehr should not be credited because she had been discharged by Respondent and therefore must be biased or, as Respondent says, "disgruntled."

I have carefully considered these contentions. However, the confusion as to dates—which did make an unfavorable impression at the hearing—is not critical to the resolution of this case and was clearly unintentional. The testimony of three employees that they did not hear Foreman Brown use the profanity attributed to him, in the circumstances shown by the record, is not convincing that the conversation did not take place. And the fact that Leach may benefit from this case, a matter which has been carefully considered, does not ipso facto disqualify her as a witness. See Fed.R.Evid. 601.[6] As to Langrehr, her explanations with respect to the affidavits given the General Counsel's investigator were convincing and I accept them. As noted, Leach and Langrehr corroborated each other as to the substance of the conversation.

On the other hand, Foreman Brown was an unimpressive witness, appearing at times to be evasive, contradictory, and lacking in candor. For example, Brown first admitted and then denied within the space of two questions that he had heard that Leach was involved with the Union. (Pozzuoli readily admitted that he had heard "rumors" that Leach, among others, was involved.) Further, concerning a time when Pozzuoli was openly making speeches to the employees advising them of Respondent's strong opposition to the Union, Brown, after first testifying that he knew how Respondent "felt" about the Union, then said that he did not "think" Respondent wanted a Union and "It is hard for me to know whether they wanted to." Pozzuoli testified that top management had discussed the matter and was strongly opposed to the Union. I do not believe that Foreman Brown was unaware of this.

Of particular significance in considering the dispute over this conversation is the fact that, though Foreman Brown denied using the profanity noted, he did not deny the substance of the conversation reported by Leach and Langrehr. After considering all of the factors involved, I credit Leach's testimony as set forth above. To the extent that Foreman Brown's testimony is inconsistent, it is discredited.

[6] The Advisory Committee's note accompanying this rule states that "among the grounds [of incompetency to be a witness] thus abolished [by this rule] are . . . connection with the litigation as a party or interested party. . ."

2. The week of August 16

a. *Interrogation and threats*

Leach testified that on Monday, August 16, leadperson R. Brown came into Leach's work area in the morning and bluntly asked her how she felt about the Union, to which Leach said that she had no comment. R. Brown denied that she had interrogated Leach.

On cross-examination, Leach gave evidence of a firm recollection of this event, and, since I believe that she would be unlikely to have fabricated the incident out of whole cloth, I credit Leach in this matter.

Later that day, Respondent laid off or discharged a number of employees, including Leach, as discussed hereinafter. Also that day, Respondent's general manager Pozzuoli spoke to gatherings of employees concerning Respondent's reaction to the Union's attempt to organize the employees.[7]

Langrehr and employee Nola Sue Coleman testified that on August 16 Pozzuoli spoke to employees, estimated to be from 6 to 10 in number, gathered in the final inspection room. According to Langrehr, the speech took place about 2:15 in the afternoon. She stated that Pozzuoli said that "there was going to be a big layoff in the Company." (Leach, who was not present at the speech been notified by Foreman Brown that she was laid off.) Langrehr further stated Pozzuoli said "that the owners of the company knew about the thing with the union and that if the union was voted in, that the owners of the company would take it back to a prototype shop which meant that the company could be run with eight to ten people.[8] And that you had to have signature cards . . . in order to have a vote whether the union could get into the company or not and if we voted the union in there would be indefinite layoffs whereas right now it would just be temporary layoffs." Langrehr recalled that Pozzuoli said that the Union was "backed" by criminal elements, that there was a lot of talk about the Union and about layoffs, and that Pozzuoli said that he could not say how long the present layoffs would be.

Coleman recalled only that Pozzuoli said he did not want the Union in the Company and "gave a few examples why he didn't want them in there. That they resort back to a prototype shop or something if the union did get in."

Leach testified that she came into the room at the last part of the speech, and said, "I heard Tom Pozzuoli telling the people that this is not a threat to their job, but if the union comes in he would have to lay off all the employees indefinitely and they would have to go back to prototype, which meant that the company could be run by eight to ten people and those people would be supervisors."

[7] The indications are that Pozzuoli made more than one such speech to employees on August 16 and thereafter. However, there is direct evidence as to the substance of only one speech on August 16.

[8] Respondent at the time had 88 employees. Pozzuoli explained at the hearing that a prototype shop, in effect, makes a few electronic boards on order as samples, so that the customer can see if they work. Such a specialty operation would need a few employees. Respondent, however, was engaged in mass production of electronic boards.

In his testimony concerning what he said in the speech, Pozzouli asserted, "Essentially all the speech said was that we are losing money right now. We can't afford any other expenses. If the Union got in they would make demands. We could not meet them because we weren't meeting our obligations as it was. Not meeting the obligations would probably lead to a strike. If they went on strike there was nothing we could do because we still couldn't afford to meet the demands. At that point I said the strike probably would go on forever and I am not going to let the company disappear. If I have no employees, if I just have the eight to ten owners we will be a prototype shop. That is all that would be left for us. And I think that might be what happens when the union comes in."

The problem presented causes me considerable difficulty. We do not have in this case, as in many others, a written copy of Respondent's speech to corroborate the general manager's testimony. Indeed, Pozzuoli testified that his account was only "essentially" what was said. All of the accounts, including Pozzouli's, show that his intent was to raise concern among the employees that they would lose their jobs if they brought the Union into the plant. All agree that he said that this would occur upon the Respondent's becoming a prototype shop which could be operated by 8 to 10 supervisors ("owners"). The difference between the accounts of the employees and that of Pozzuoli is that the latter asserts, based on a series of speculations (the Union would make demands that Respondent could not meet because of its financial condition, there would be a strike, the strike would be protracted, the viability of the Company would be threatened), that the employees were given to understand that they would lose their jobs because of activities of the Union rather than any intent of Respondent to keep the Union out. Again, resolution of the issue would be less difficult if there were some evidence that justified Respondent's alleged speculations or other corroboration of Pozzuoli's testimony. On consideration of all the evidence, I am inclined to believe that the testimony of the employee witnesses more nearly reflects what Pozzuoli said and therefore credit Langrehr, Coleman, and Leach as set forth above. I do not credit Pozzuoli's explanation.

Closely paralleling the matters just discussed is a conversation which employee Charles Craig O'Neill asserts that he had with Foreman Brown about a week or two after August 16 in one of Respondent's offices. O'Neill said that he asked Foreman Brown "what was the secrets going on downstairs." According to O'Neill, Brown then replied that "there was no secrets. He said there was some discussions about the company's problems with this here union trying to get in. And he said . . . he'd explain to me what it was all about since Mr. Tom [Pozzuoli] did not tell me himself." O'Neill said that he had been busy doing other things when Pozzuoli was giving his "little discussions." Brown continued, O'Neill stated, that "[he] himself did not like unions and he asked me how I felt about them. I told him I was for them. He asked me why. I said because it would help out my paycheck, give me more better insurance for myself, and maybe paid holidays. . . . He also said that if the union would get into Nueva that their alternative would be to go into a proto shop, which would go to minimum employees and therefore there would be a big layoff and the shop would just become small where the union wouldn't be able to get in at all."

Brown denied that "subsequent to the layoff occurring or beginning" he ever had a conversation with O'Neill in which Brown discussed with O'Neill "the statement that Mr. Pozzuoli was alleged to have made on August 16." Brown also denied that he "ever told O'Neill that if the union got in the company would revert to a prototype [shop]."

Respondent argues that O'Neill's testimony "should be viewed with extreme suspicion" (Br., p. 3) because he did not give an affidavit to the General Counsel until he had assertedly been discharged by Respondent for misconduct.[9] However, O'Neill explained, credibly it seemed to me, that he had given his affidavit when the General Counsel's agent located him for an interview. I have previously indicated my lack of confidence in Foreman Brown's testimony. I credit O'Neill as to this conversation.

b. *Surveillance*

During the day on August 16, the Union distributed a leaflet at Respondent's premises, which was also posted in the plant, advising that there would be a union meeting at the Landsdowne School that afternoon after work. It is admitted that Respondent received a copy. However, before the end of the workday, it was decided to cancel the meeting, and word of this was circulated among the employees.

After work that day employees Coleman, Langrehr, and O'Neill were riding to Coleman's home in O'Neill's vehicle on a road which passed the school grounds, a normal route to Coleman's home, when they noted Foreman Brown and Robert Yeskir, another supervisor and agent of Respondent, riding about in the school parking lot. As the employees passed by, Brown and Yeskir exited the school lot and followed the employees to Coleman's residence.

The next day, Coleman told Brown that she "didn't appreciate being followed home" from work. Brown apologized for upsetting Coleman by following her the previous day. Later, Brown told O'Neill that it was not Brown's intent to follow the employees home, but that "he was just trying to find the Union meeting . . . there was no one that showed up at the school and he [Brown] thought that we going to another location where the meeting would be held."

None of this testimony was denied.

c. *The layoff*

During the course of the workday on Monday, August 16, Respondent's supervisors in various departments told

[9] O'Neill admitted the misconduct, but not that he was discharged. Pozzuoli, who assertedly discharged O'Neill, was not asked about the incident. However, for the purposes of this decision I have assumed that O'Neill was discharged.

six employees that they were being laid off that day.[10] Among those let go, Leach, who had been hired on February 22, had more seniority than any of the others. She also had more seniority than any of the employees in her department who were retained (one employee had been employeed approximately 1 month, a second about 2-1/2 months; and the third 3-1/2 months). When informed by Foreman Brown, in the early afternoon, of her layoff, she protested that she had more seniority and a higher production level than the other employees in the shipping room. When she asked why she had been chosen, Brown would only say that as part of a layoff in the plant he had chosen her .to laid off in the shipping room[11] Later when she went to see Robert Yeskir for her "layoff papers," he also could not tell her why she had been laid off.

The General Counsel does not contend that the layoff on August 16, in general, violated the Act, but asserts that the choice of Leach to be one of those to be separated from employment discriminated against her for her union activities in violation of the Act.

The process by which it was decided how many employees were to be laid off, and when their identity was ascertained, is difficult to ascertain on this record. It seems clear that Pozzuoli was holding meetings with the supervisors during the week of August 9 in which the possibility or the probability of a layoff was discussed. Pozzuoli said that he requested the supervisors to inform him as to how many employees in their departments they thought they could dispense with, so that Respondent could determine how many employees should be let go. With considerable uncertainty, Pozzuoli testified that this was accomplished late on Friday, August 13, and that the supervisors were instructed to lay off employees on the following Monday.[12] Both Foreman Brown and Pozzuoli agree that the supervisors were given no criteria by which to determine who should be laid off, but that Pozzuoli relied on the supervisors' individual judgment.

Brown stated that he selected Leach for layoff because she had refused his offer to permit her to substitute for the shipping department leadperson, Rose Bundick, while Bundick was on vacation for 1 week beginning August 16, and thus, according to Brown, Leach "refused advancement." Brown admited that he offered Leach the assignment because he felt she was able and capable. Respondent agrees that Leach was a good employee at her work. Leadperson R. Brown, about the first of August, told Leach that Respondent's management had refused to transfer Leach to R. Brown's department because Leach was "needed more in the shipping room."

Leach stated that, when Foreman Brown asked her to substitute for Bundick while the latter was on vacation, he stressed that her job would entail seeing to it that 375 panels were shipped out each day and, if not, she "would be in trouble." She was told that she would not be expected to perform supervisory functions and that the assignment would not involve a pay increase. Leach was not informed that the assignment was a promotion or that a refusal to accept would affect her employment.

Foreman Brown, on his part, asserted that he told Leach that the job involved a lot of responsibility and, if she did a good job, "it would be a feather in her cap." He said that he told Leach that the workload would require a lot of work to get out, but denied that he said what would happen if she did not get the work out. To the extent that Brown's testimony conflicts with that of Leach, I credit Leach.

Leach originally indicated to Brown that she would accept the assignment, but, about a week before Bundick was scheduled to go on vacation, Leach informed Brown that she would prefer to remain in her own job, and that she felt she could assist Respondent more in getting production out in that way.[13] Brown made no comment and selected another substitute for Bundick.

As a second reason for selecting Leach for layoff, Foreman Brown asserted she was the highest paid employee in the shipping room and thus, presumably, Respondent might save more money by letting her go. At the time Leach, who, as has been noted, was the most senior of the employees in the shipping room, was receiving $3.90 per hour. The other three employees in the department were making $3.35.

According to Foreman Brown, raises were given to Respondent's employees baed on merit; if they did good work, they were given raises, otherwise not. It is thus apparent that Leach's rate was her compensation for doing her job well. The others seem to have remained at the starting rate.

II. ANALYSIS AND CONCLUSIONS

A. *Interrogation*

As previously found, employee O'Neill was interrogated by Foreman Brown as to "how he felt" about the Union, and why he was in favor of unionization, in a context in which Brown not only made clear that an employee favoring the Union would be at odds with Brown, but that bringing the Union in would constitute a threat to the employees' employment. In the circumstances of this case, I find that Respondent thereby violated Section 8(a)(1) of the Act.

[10] This was the number stipulated at one point by counsel. Pozzuoli recalled the number as eight or nine. There is some confusion as to whether Langrehr, who was not on the list stipulated by counsel, was discharged or laid off on August 16. Respondent's counsel contends that she was fired; she said that she was laid off. She was notified of her separation in the afternoon but apparently worked to the end of the day, which seems incompatible with discharge.

[11] At the time Brown was the foreman over three departments. The only person he chose for layoff was Leach.

[12] Foreman Brown stated that he was informed (but not at a meeting) a "couple of days" before August 16 that he must lay someone off. However, Brown also said that he did not remember specifically when he decided to let Leach go. He said that "the decision was made several days in advance [of the layoff] when we had the meetings about the cutbacks." I am satisfied, as indicated hereinafter, that Brown's indefinite time references are not reliable.

[13] Leach said that she told Brown of her decision on Monday, a week before Bundick went on vacation. Brown testified that Leach told him "a couple of days" before Bundick was to leave. This is manifestly incorrect, since Bundick testified that she began training the employee finally selected as her substitute on Monday, a week before her vacation began.

I see no purpose in discussing leadperson R. Brown's questioning of employee Leach as to whether she favored the Union in a context not quite so obviously coercive, inasmuch as that incident would not affect the scope of the Order which will be recommended. It will therefore be recommended that this alleged violation of the Act be dismissed.

B. *Threats*

As noted above, the employees testified, and I have found, that General Manager Pozzuoli, in a speech on August 16, advised that if the Union were brought in Respondent would cut back on its operations so that it could be run entirely by supervisors, and the employees would thus be laid off indefinitely. In discussing with O'Neill what Pozzuoli was telling the employees, Foreman Brown conveyed the same message. I find these activities to be threats of reprisal against the employees because of their union activities in violation of Section 8(a)(1) of the Act.[14]

C. *Surveillance*

It is not denied that, on the afternoon when a union meeting had been scheduled to be held at a local school (but which had been canceled, apparently unknown to Respondent), Foreman Brown and Robert Yeskir, another agent of Respondent, were riding around the school parking lot about the time the meeting would have been held. When several employees rode past the school, Brown and Yeskir followed them until they arrived at the home of one of the employees. Brown later admitted to one of the employees that, when no employees showed up at the school for the scheduled meeting, he and Yeskir followed the employees in an effort to find out where the meeting was being held.

Respondent argues (br. pp. 17-18) that, inasmuch as the complaint alleges that Brown and Yeskir were "engaged in surveillance of employees *who were engaged in activities on behalf of the Union*," and on this occasion the employees followed were not in fact engaged in union activities, the evidence does not support the allegations of the complaint. However, the record is clear that on this occasion the supervisors did engage in surveillance of the employees, and that the supervisors did so because they thought that the employees were engaged in union activities. In the circumstances, it was not unreasonable for the employees to assume that they were being followed to see if they engaged in union activities, and the supervisors' conduct thereby served to inhibit, restrain, and coerce employees in their union activities in violation of Section 8(a)(1) of the Act. Though the complaint was somewhat inartistically drawn, there is no showing that Respondent was in any way misled thereby.

[14] As has been previously noted, Pozzuoli asserted that he was merely speculating that the employees would lose their jobs because of action by the Union. However, Respondent presented no basis for such alleged speculation either to the employees or at the hearing. In the absence of any basis for such alleged speculation, Respondent's assertion clearly implies that Respondent would retaliate against the employees because of their union activities. See, e.g., *Fred Lewis Carpets*, 260 NLRB 843 (1982).

D. *The Layoff*

On August 16, Respondent terminated six to nine employees. Of these, the General Counsel contends that only Cecilia Leach was let go in violation of the Act. By most ordinary standards it would seem that she would be one of the last employees Respondent would want to lose. She had more seniority than any other employee in her department (the shipping room and, indeed, had more seniority than any of the other employees let go on August 16. She was better skilled in the operations of her department than any of the other employees in the shipping room and had received substantial merit increases because of the quality of her work, whereas the other employees had received none. Leach testified, and it is not denied, that Respondent's supervisors had often complimented her on her work. About 2 weeks prior to her layoff, Respondent had refused to transfer Leach to another department because of her value to the shipping room. The foreman over the shipping room, Lee Brown, about this same time had offered to permit Leach to substitute for the shipping room leadperson for a week, beginning on August 16, while the leadperson was on vacation. Leach refused the offer. Nevertheless, it is strange that Foreman Brown would thereupon select her, his most experienced employee in the department, for layoff at the very time the leadperson was on vacation and at a time Respondent was anxious to get a large amount of production shipped.

Foreman Brown, who chose Leach for layoff, knew of her union activities, and was himself clearly opposed to the employees' union activities, particularly evidencing his displeasure concerning the Union to Leach by going out of his way to express his hostility by means of profanity in statements that the Union would not get in Respondent's operations and by advising Leach that if she did not like working for Respondent, "and you are for all that Union business, then why don't you work somewhere else, because I don't want no f—g union in here."[15]

Brown's asserted reason for picking Leach for separation do not, in the circumstances of this case, bear up well under analysis. His main justification for selecting Leach for layoff was that, by declining his offer to permit her to substitute for the shipping room leadperson for 1 week, Leach had "refused advancement." But Leach was told that this assignment was not a promotion, would not involve any supervisory duties, and would not entail any increase in wages. Nor was she told at any time that refusal to accept the assignment would affect her employment status with Respondent.

Brown secondly asserted that he selected Leach for layoff because she was the highest paid employee in the department and her layoff would thus, presumably, save Respondent more money. But this is a non sequitur. Under Respondent's system, Leach was the highest paid because she was the most capable and able. There is no indication that those employees retained (one of whom

[15] The Board has held on numerous occasions that such statements constitute implied threats of discharge. See, e.g., *Intertherm, Inc.*, 235 NLRB 693 (1978). *Fred Lewis Carpets*, supra.

had been employed about 1 month) could have efficiently taken over Leach's work or saved Respondent any money thereby. Indeed, as has been noted, it is particularly odd that Respondent should have laid off its most experienced person at the very time the leadperson in that department was scheduled to go on vacation.[16]

In the circumstances of this case, and upon the entire record, I find that the reasons given for the layoff of Cecilia Leach are pretextual, and that, in fact, Respondent laid off Leach because of her union membership and activities.[17]

Upon the above, and the record as a whole, I find that Respondent, by the layoff of Cecilia Leach on August 16, 1982, violated Section 8(a)(3) and (1) of the Act.

III. RESPONDENT'S REQUEST THAT THE GENERAL COUNSEL DISCLOSE FILE MATERIAL

At the close of the General Counsel's presentation of evidence, Respondent's counsel requested that counsel for the General Counsel "deliver to me perusual any evidence that she has which tends to exculpate my client of liability," stating that he was relying upon the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). In the absence of voluntary compliance with his request, Respondent sought an order to compel the General Counsel to comply. Respondent admitted that he had no indication that the General Counsel had any such material. I denied Respondent's request for an order to the General Counsel to comply with Respondent's request. Those tribunals which have passed upon that issue have held that *Brady v. Maryland* is not applicable to proceedings before the Board. See *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1969); *Erie County Plastics Corp.*, 207 NLRB 564, 570 fn. 29 (1973), enfd. 505 F.2d 730 (3d Cir. 1974).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning their union adherence and sympathies, by threatening employees with reprisal if they selected the Union as their bargaining agent, and by engaging in surveillance of employees thought to be engaged in activities on behalf of the Union, Respondent engaged in conduct in violation of Section 8(a)(1) of the Act.

4. By laying off Cecilia Leach because of her activities on behalf of and membership in the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminated against Cecilia Leach in violation of the Act, but that Respondent offered Leach reinstatement effective October 11, 1982, which she has declined, it will be recommended that Respondent make her whole for any loss of pay or benefits which she may have suffered as a result of the discrimination against her by payment to her of a sum of money equal to what she would have earned as wages and other benefits from August 16, 1982, the date of the discrimination against her, to October 11, 1982, less her net interim earnings during that period, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Nueva Engineering, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in or activities on behalf of a labor organization by discriminating in regard to the hire and tenure of employment of employees or in regard to any term or condition of employment.

(b) Coercively interrogating employees concerning activities on behalf of or support of a labor organization.

(c) Threatening employees with reprisal if they joined or supported a labor organization.

(d) Engaging in surveillance of employees because they are engaged in or are suspected of engaging in union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make Cecilia Leach whole for any loss of earnings and benefits she may have suffered by reason of the discrimination against her in accordance with the provisions set forth in the section hereinabove entitled "The Remedy."

(b) Expunge from its records any references to the layoff of Cecilia Leach on August 16, 1982, and notify her in writing that this has been done and that evidence

[16] At one point Brown suggested that he was concerned about placing a lower paid employee in the shipping room (as a substitute for the leadperson) over Leach, a higher paid employee. However, as Brown told Leach, no supervisory relationship was involved. The time interval was only 5 days, and Leach had, in fact, consented to this situation.

[17] It was stipulated that Respondent recalled Leach to work "effective October 11," but that Leach declined the offer.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of this unlawful layoff will not be used as a basis for future personnel action against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to effectuate the Order herein.

(d) Post at its Baltimore, Maryland operations copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be and it hereby is dismissed as to alleged violations of the Act not found hereinabove in this decision.

[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."